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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 137

RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, co-partners, doing business as Pryor Hay and Grain Company; and RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, as individuals; and GENE D. DILLON,
Petitioners,

vs.

JAMES TALCOTT, Inc., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on the 13th day of March, 1964.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, *infra*, page 29. The judgment of the Circuit Court of Appeals is printed in Appendix B hereto, *infra*, page 34. The Order and Judgment of the United States District Court for the Northern District of Oklahoma is printed in Appendix C hereto, *infra*, page 35.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 13, 1964, (*infra*, Appendix B, page 29). Rehearing was denied on April 13, 1964, (*infra*, Appendix D, page 37). The jurisdiction of the Court is invoked under 28 U. S. C. Sec. 1254 (1). Order staying Mandate issued April 30, 1964, granting a stay of 30 days and thereafter subject to further order of the court.

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether petitioners, purchasers of certain grain storage warehouses under a conditional sales contract, are entitled to assert their defenses of breach of warranty of quality and fitness of said grain storage warehouses, as well as any other defenses they might have, not only against the seller, but subsequent purchasers and assignees of said conditional sales contract, such as respondents, who seek replevin in this case of said grain storage warehouses under said conditional sales contract under Oklahoma law?

2. Whether the Court of Appeals erred in affirming the judgment of the court below in a replevin action for possession of the personal property in question insofar as it further affirmed said judgment granting a personal judgment against petitioners upon the promissory note and conditional sales contract involved herein for the principal amount; with interest and attorneys' fees claimed by respondent, and in further decreeing such judgment to constitute an equitable lien upon the property herein, and providing for the sale of said property and the entry of a deficiency judgment for any balance remaining unpaid.

If the answer to the foregoing questions is in the affirmative, then:

3. Whether the clause appearing in said conditional sales contract and referred to in the opinion of the Court of Appeals, to-wit: "We will settle all claims against you, the seller, directly with you, you hereby agreeing to remain responsible therefor, and we will not set up any such claim against your assigns", has a binding effect upon the petitioners and operates to withhold the asserted defense of the seller's breach of implied warranty of quality and fitness against the respondent, the seller's assignee, or whether the same is inoperative as contrary to the policy of the law as enunciated in the pertinent and applicable statutes of the State of Oklahoma, as follows, to-wit: 12 O. S., 1961, Sec. 222, 12 O. S., 1961, 278, 15 O. S., 1961, Sec. 241, and 15 O. S., 1961, Sec. 216.

4. Whether the Court of Appeals erred in affirming the order of the court below sustaining the motion of respondent for summary judgment in its finding and conclusion that the Answer and Amended Answer of petitioners do not present any genuine issue as to any material facts, and the concluding as a matter of law that respondents were entitled to judgment.

5. Whether the Court of Appeals erred in affirming the judgment of the court below in failing and refusing to find and determine that the facts alleged in petitioners' Answer and Amended Answer are sufficient to constitute a complete defense to the cause of action plead by respondents.

6. Whether substantial justice can be had if petitioners are now allowed their day in court and right to present evidence in support of their allegation of breach of warranty of quality and fitness of said grain storage warehouses as a defense to said action, in accordance with the well-established principles of law and the policy of express law of the State of Oklahoma.

7. Whether said Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings and/or has so far sanctioned such a departure by the lower courst since it is apparent that said lower court treated this action as one for the foreclosure of an equitable lien and accordingly, without the introduction of any evidence or supporting affidavits, determined the amount of principal, attorneys' fees, and interest due to the respondent, and adjudged that respondent have judgment for the possession of the property covered by said conditional sales contract for the purpose of sale, and entered judgment against petitioner for any balance remaining unpaid; that said judgment of the Court of Appeals should be modified and reversed, insofar as it purports to enter a personal judgment against petitioners, including the award of such unreasonable and excessive attorney's fees.

STATUTES INVOLVED

The applicable statutes of Oklahoma are as follows:

15 Okl. St. 1961, Section 172, reads as follows:

> "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

15 Okl. St. 1961, Section 171, provides:

> "Stipulations which are necessary to make a contract reasonable or conformable to usage, are implied in respect to matters concerning which the contract manifests no contrary intention."

12 Okl. St. 1961, Section 222, reads:

> "In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due".

12 Okl. St. 1961, Section 278, which provides:

> "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or setoff could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other".

15 Okl. St. 1961, Section 211, which reads:

"Those contracts are unlawful which are:

1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or
3. Otherwise contrary to good morals."

15 Okl. St. 1961, Section 216, which provides:

"Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

STATEMENT

This is a replevin action instituted on the 3rd day of April, 1962, by respondent as assignee of a conditional sales contract, in the United States District Court for the Northern District of Oklahoma, for possession of two certain Inland Steel grain storage warehouses located in the city of Pryor, Oklahoma.

On June 28, 1958, the Pryor Hay & Grain Company, a co-partnership composed of Gene D. Dillon, Mary D. Evans, and Josh J. Evans, purchased said two certain Inland Steel grain storage warehouses under said conditional sales contract, appearing at Page 3 of the transcript of record, and as a part and parcel of said transaction, a promissory note in the sum of

$88,760.04, was made and delivered by petitioners to the said ABC Construction Company, which note is reproduced in its entirety and appears at Pages 5 and 6 of the transcript of record.

The said ABC Construction Company sold, assigned and set over said conditional sales contract and promissory note unto the First Acceptance Corporation, its successors and assigns, and thereafter, respondent, James Talcott, Inc., successor to the First Acceptance Corporation, became the present owner and holder of said conditional sales contract and promissory note.

That the balance on said promissory note and conditional sales contract is in the amount of $27,000.00, the petitioners having paid the sum of $61,760.04 on said note and conditional sales contract, and having paid altogether, the sum of $86,485.04, consisting of the sum of $61,760.04, paid on said note and conditional sales contract, and a down payment of $24,725.00.

On or about the 9th day of April, 1961, and after the normal use of said grain storage buildings for the purpose for which they were intended, said buildings structurally failed, and became unsuitable for such purposes.

Thereafter, and on the said 3rd day of April, 1962, as hereinabove stated, respondent instituted this action after petitioners had notified respondent of the defects in said buildings and resultant damages to them,

and refused to make any further payments until proper allowances and adjustments were made by reason thereof, alleging that the petitioners have failed and refused to pay a balance due on said conditional sales contract in the amount of $27,000.00, principal, $4,050.00 as attorneys' fees, as provided therein, plus interest thereon at the rate of ten per cent per annum from the 15th day of September, 1961, and that by virtue of said breach by the petitioners, that respondent is entitled under the terms of said conditional sales contract to possession of said grain storage buildings covered thereby, and respondent asks for judgment against petitioners for possession of said personal property for the purpose of sale thereof, and judgment against petitioners personally for any deficiency due after application of proceeds of such sale on the balance to respondent, including interest and costs, and such other relief both in law and in equity, to which the respondent may show itself entitled.

Respondent alleges in said action, and makes the contention, that the terms of the conditional sales contract itself preclude the petitioners from setting up any claim which they might have against the original seller, and the respondent as assignee of the seller, and particularly the following provision, to-wit: "We will settle all claims against you, the seller, directly with you, you hereby agreeing to remain responsible therefor, and we will not set up any such claim against your assigns"; respondent further alleges that a new partner-

ship was formed which succeeded to the interest of the original partnership under a transfer and assumption agreement to which the sellers assignee consented, and that further, that said new partnership asked for and was granted an extension and forbearance agreement between petitioners and the sellers assignee, and that by reason of the petitioners' execution of the ed complaint of respondent, admit the execution of assignment and assumption agreement, and the extension and forbearance agreement hereinabove referred to, the petitioners are estopped from setting up the defense of breach of implied warranty of fitness, and also that petitioners, by their written contract and agreement, covenanted that no oral agreement, representation or warranty shall bind the respondent as assignee of the contract.

Petitioners for answer to the complaint and amendtd complaint of respondent, admit tre execution of said conditional sales contract and promissory note, but further allege that respondent acquired said note and conditional sales contract subject to all defenses and rights which petitioners may have had or now have against respondent assignors.

Petitioners admit the execution of the transfer and assumption agreement, but deny the formation of a new partnership. The Pryor Hay & Grain Company was originally a co-partnership composed of Gene D. Dillon, Mary D. Evans and Josh J. Evans; however,

Gene D. Dillon withdrew on August 8, 1959, as a member of the firm, and on the same day, Russell J. Straight entered as a new member thereof with the consent and approval of the other members of the firm. Petitioners contend that since no new partnership was formed, that said agreements were therefore without consideration.

Petitioners also admit the execution of the extension agreement, but contend that same was without consideration and deny that the agreements plead by respondent operated to estop them from asserting their counterclaim in this case for the reason that the defects in said grain storage buildings which were brought about by the breach of warranty of quality and fitness were hidden and latent, and were not discovered by petitioners and could not have been discovered by petitioners by the exercise of diligence until April 9, 1961. Petitioners, by reason of the failure of said buildings, suffered damage and injury in an amount in excess of the amount prayed for by respondent herein against petitioners.

Petitioners further allege that said conditional sales contract and promissory note were executed by petitioners to evidence the unpaid balance of the purchase price of the two grain storage buildings involved herein, and that respondent acquired such conditional sales contract and promissory note with full knowledge, either actual or constructive, of the defenses

which the petitioners had against the respondents assignors.

Respondent, pursuant to Rule 56 of the Federal Rules of Civil procedure, filed a motion for summary judgment for the relief demanded in its complaint on the grounds that there is no genuine issue as to any material fact, and that respondent was entitled to judgment as a matter of law.

The court below, the United States District Court for the Northern District of Oklahoma, found that there is no genuine issue of fact to be submitted to the trial court, and entered a summary judgment for respondent, and ordered, adjudged and decreed that there is due on the conditional sales contract and promissory note, of which plaintiff is the owner, the sum of $31,050, consisting of $27,000 principal, and $4,050 attorney fees, as provided therein, with interest thereon at the rate of 10 per cent per annum from the 15th day of September, 1961, and by reason of such default, plaintiff does have and recover judgment for the possession of the goods, wares and merchandise set forth in said conditional sales contract, to-wit:

> 2—70' x 180' x 20' Inland Steel Grain Storage Buildings, Serial Numbers 1043 and 1129, together with component parts, accessories, concrete foundation and floor,

all as provided in said conditional sales contract for the purpose of sale, with net proceeds thereof to be

credited upon the amount unpaid, with any balance to be a judgment against said defendants, and each of them, and any surplus to be accounted for to them.

An appeal was taken by petitioners to the United States Court of Appeals for the Tenth Circuit, which court of appeals affirmed the judgment of the court below. Thereafter, petition for rehearing was denied.

The federal jurisdiction in the court below is by virtue of diversity of citizenship of the respondent, James Talcott, Inc., which is a corporation organized under the laws of the State of New York with its principal place of business and operating office in the State of New York, and the petitioners, Russell J. Straight, Mary D. Evans, Josh J. Evans, and Gene D. Dillion, are all individuals, citizens and residents of the State of Oklahoma, together with the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

REASONS FOR GRANTING THIS WRIT

As pointed out in the statement hereinabove, it must be recognized from the outset that this is not a case of default or an effort to avoid just indebtedness, but is a case wherein petitioners have been denied their day in court and their right to present evidence in their behalf as to the breach of warranty of quality and fitness of the buildings purchased under the conditional sales contract, upon which respondent's action is based.

In this connection, a breach of implied warranty of quality and fitness is a failure of consideration and a defense which petitioners have alleged, and must be accepted as true in order to determine whether or not petitioners' amended answer presents a genuine issue as to any material facts within the meaning of Rule 56 of the Rules of Civil Procedure, and petitioners should have a right to assert said defense since the rule is settled in Oklahoma that a plea of breach of warranty is the substantial equivalent of a plea of total or partial failure of consideration, and may be shown as a defense in an action based on a conditional sales contract. See *Wayne Tank & Pump Co.*, v. *Harper*, 118 Okl. 274, 247 Pac. 985.

The Circuit Court of Appeals has decided an important State question in a way in conflict with applicable state law. Petitioners must respectfully submit that it is a well-established principle of law and the policy of express law of the State of Oklahoma that "the defenses of purchasers under a conditional sales contract are available to them not only against the seller, but subsequent purchasers and assignees as well". The Supreme Court of the State of Oklahoma has just handed down a decision in a case wherein the appellee in this case is a party, styled *James Talcott, Inc.* v. *Finley*, 389 P. 2d 988 wherein the court reaffirmed and clarified its previous decisions pertaining to the above principle of law, in which case the plaintiff, (assignee holder of a note and a conditional sales contract), was

seeking replevin and possession of certain chickens, based upon the title retention clause contained in the conditional sales contract and the court held that when plaintiff sought possession by replevin, it waived the question as to the negotiability of the instrument, if it was negotiable, and thereby made available to defendant any defenses he had against the original payee, citing *Universal Credit Co. v. National Radio Mfg. Co.*, 174 Okl. 178, 29 P. 2d 743; *Mercantile Trust Co. v. Roland*, 143 Okl. 190, 288 Pac 300; and *Selected Investments Corporation* v. *Lester, et ux.*, Okl., 327 P. 2d 668.

From the above cited authorities, petitioners must respectfully submit that Question No. 1 must unquestionably be answered in the affirmative.

The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and/or has so far sanctioned such a departure by a lower court, the United States District Court for the Northern District Court of Oklahoma, as to call for an exercise of this court's power of supervision.

It is apparent from a reading of the judgment rendered by the court below, the United States District Court for the Northern District of Oklahoma, that said court treated this action as one for the foreclosure of an equitable lien. In fact, it is quite vividly revealed that said court below proceeded upon the theory that here is a suit on a note on which there is a balance due,

and which provides for an attorney's fee and deficiency judgment under certain conditions, and. acting upon this plain misapprehension of the character of this action, being one for replevin only, accordingly without the introduction of any evidence or supporting affidavits, determined the amount of principle, attorney's fees, and interest due to the respondent, and adjudged that respondent have judgment for possession of the property covered by the conditional sales contract for the purpose of sale, and entered judgment against petitioners for any balance remaining unpaid in total disregard of the well-established principles of law and the policy of express law of the State of Oklahoma, and the equities on behalf of the petitioners involved in this matter.

It will be noted that although the respondent concedes that the present action was brought by it "for possession of personal property in the nature of a suit for replevin under a conditional sales contract covering such property, the Circuit Court of Appeals, by its opinion and judgment, affirmed the trial court's said judgment under authority of *Selected Investments Corporation* v. *Anderson*, 319 P. 2d 588.

The rule is settled in Oklahoma that an equitable lien foreclosable in equity does not arise in favor of a vendor under a conditional sales agreement where, as here, the contract provides that the vendees should acquire no title or right of ownership in the chattels until

the purchase price has been fully paid, and where, as here, the vendor, and its assigns, reserved title with the right to regain possession of the chattels upon the failure of the vendees to pay the purchase price according to the terms of the contract (*Haubert* v. *Bryan and Doyle*, 171 Okl. 338, 43 P. 2d 68), and it necessarily follows that the only judgment the court below was authorized to enter in this case was one for the possession of property in accordance with the terms of the contract involved herein.

Although, as the Supreme Court of Oklahoma held in *Selected Investments Corporation* v. *Anderson*, *supra*, the respondent, after recovering the possession of the involved chattels, pursuant to said judgment, had the option to sell the same, after notice according to Oklahoma law, if it elected so to do, and to institute an action or proceedings for the recovery of any unpaid balance due under the terms of the conditional sales contract, yet, as the court held in such cited case, the action of the court below in purporting to determine the unpaid balance due under the contract involved herein, and to render a deficiency judgment against petitioners, prior to the sale was premature and without the jurisdiction of the court below, and for this reason, the judgment of the court below should be modified and the cause remanded with appropriate instructions to the court below.

Likewise, as hereinbefore stated, the court below, without the introduction of any evidence or supporting

affidavits, awarded respondents the sum of $4,050.00 as an attorney's fee, which sum, we say, is excessive and cannot be supported by the provisions of the conditional sales contract involved herein. In this connection, we call attention to the fact that it is a settled rule in Oklahoma that in the absence of an express agreement as to the exact amount of an attorney's fee, the Court must hear evidence to determine what is a reasonable attorney's fee (*Federal Land Bank of Wichita* v. *Denson*, 172 Okl. 225, 44 P. 2d 891), and this Court is committed to the rule that the amount fixed in a note or other written obligation for the payment of attorney's fees is *prima facie* evidence of the sum recoverable, but it may be reduced by the court in exercise of its sound discretion, if excessive or unreasonable, (*Webster Drilling Company* v. *Walker*, C. A. 10, 286 F. 2d 114, 117). The allowance of such excessive and unreasonable attorney's fee is not and cannot be justified by the record of this case, and that the judgment of the court below should, accordingly, be modified.

Petitioners must therefore respectfully submit that not only Question No. 2, but Question No. 7 must be answered in the affirmative and the judgment of the court of appeals affirming the judgment of the lower court should be modified, and reversed, certainly insofar as it purports to enter in a replevin action, a personal judgment against petitioners, including the award of such unreasonable and excessive attorney's fees.

Since Questions Nos. 1, 2, and 7 have been answered in the affirmative, it now seems pertinent to take up Question No. 3, particularly since the Circuit Court of Appeals did not base its opinion and judgment upon the applicable and controlling authorities hereinabove set forth, and the broad general principles of law and policy of express law of the State of Oklahoma, but limited its determination to the narrow grounds of the clause of said conditional sales contract as follows, to-wit: "We will settle all claims against you, the seller, directly with you, you hereby agreeing to remain responsible therefor, and we will not set up any such claim against your assigns."

All such claims as the one quoted above, have, in the past in the State of Oklahoma and in other jurisdictions having similar statutes, been held invalid.

It is therefore quite evident that the Circuit Court of Appeals has overlooked the applicable and controlling statutes of the State of Oklahoma, and or has refused to accept the precedent of the decisions of the Supreme Court of the State of Oklahoma, construing such provisions, which statutes and decisions condemn in no uncertain terms the contractural provision upon which the respondent relies, as violative of the public policy of the state.

The applicable statutes of Oklahoma are as follows, to-wit: 12 Okl. Stat., 1961, Sec. 222; 12 Okl. Stat., 1961, Sec. 278; 15 Okl. Stat., 1961, Sec. 211, and 15 Okl.

Stat. 1961, Sec. 216. The same are hereinbefore set forth in full under Statutes Involved.

The last cited section, or 15 Okl. Stat., 1961, Sec. 216, providing:

> "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void",

has been construed by the Supreme Court of the State of Oklahoma in many cases, and it has consistently held that every stipulation or condition is a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceeding in the ordinary tribunals, or which limits the time which he may thus enforce his rights is against public policy and void. See: *Wilson* v. *Gregg*, 208 Okl. 291, 255 P. 2d 517; *Boughton* v. *Farmers Insurance Exchange* (Okla.), 354 P. 2d 1085; *Merchants & Manufacturers Ins. Co.* v. *Burns*, 205 Okla. 31, 234 P. 2d 409, and *Fidelity & Cas. Co.* v. *Board of Commissioners* (Okla.), 342 P. 2d 547. And in *Modern Woodmen of America* v. *Michelin*, 101 Okla. 217, 225 Pac. 163, 169, the court, in holding void a provision of defendant's by-laws defining the requisites of proof of death of an absent person, said, in part, in its opinion:

> "If a rule of evidence can be abrogated like this, how long will it be before the procedure in all the courts of the land will be controlled by con-

tracts regulating the method of procedure and the competency of testimony and of witnesses and the sufficiency of proof? Why, this by-law, if valid, effectively repeals any statute contrary to its provisions. This company has made a little legislature of itself and would now perform the judicial functions of this court in controlling through this by-law how we shall determine the existence of a disputed fact. This course must be stopped at the threshhold or courts of justice will become lifeless and inanimate machines, mechanically operated by contracts often unfairly depriving an unsuspecting party of statutory rights which he did not intend to surrender . . ."

The cited Oklahoma statutes and decisions, under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1118, are controlling in this case, and it must, we respectfully say, be held that the quoted provision of the conditional sales contract which purports to deprive the appellants of their right to maintain their counterclaim and setoff in this case, in accordance with 12 Okla. Statutes 1961, Sections 222 and 278, *supra*, violates the public policy of Oklahoma as announced in 15 Okla. Statutes 1961, Section 216, *supra*, and the same is, therefore, wholly void.

It seems to the writer that the court of appeals has attempted to reason around the precedents established by the Supreme Court of Oklahoma, and at Page 3 of their opinion, have selected some three or four cases from other jurisdictions which concur with their view. And they also cite the case of *Voris* v. *Hall*, 71 Okla.

44, 175 Pac. 220, as sustaining the contention that the quoted provision is valid. We must respectfully suggest, however, that an examination of said case does not make such a disclosure.

Said case involved a contract for the sale of a stallion, which contained the following provision:

> "If said stallion does not fill the above guarantee after a fair trial, said Cockran agrees to furnish said purchaser another stallion of equal value and said purchaser agrees to accept said stallion in satisfaction of this contract";

and it was contended by the purchaser, plaintiff in said case, that he had the option either to stand upon the warranty and recoup his damages, or accept from the vendor another stallion that would satisfy the warranty.

It is true that the plaintiff in said case relied upon the statute which now appears as 15 Okla. Statutes 1961, Section 216, *supra*, as supporting his contention that he was entitled to maintain an action for the recovery of damages notwithstanding the terms of the contract. In answering such contention, the court held, in part, in its opinion (175 Pac. 221):

> ". . . There is no stipulation or condition contained in either of these contracts by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, and the fact that the parties are now engaged in an effort to enforce what they deem to be their respective rights under the contract by legal proceedings in the ordinary tri-

> bunals of the state furnishes the most convincing proof that this is so. What are the parties' rights under their contract? is the precise question now under consideration. Obviously the answer to this question must be found by resorting to the contract itself. Now, assuming, as the trial court found, that the guaranty has been breached by the vendor, what are the rights of the vendee under the contract? We find them stated in the contract substantially as follows: The vendee agrees that in case said stallion does not fill the above guaranty after a fair trial, the vendor may furnish him another stallion of equal value, and said vendee agrees to accept the stallion in satisfaction of the contract, provided, however, that the stallion is returned to the vendor not later than March 1, 1910, sound and in as good condition as when sold. Obviously, there is nothing in this which in the slightest restricts either party from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals . . . ."

It thus appears that said case lends no support to the opinion rendered in this case, and is not in conflict with the later Oklahoma cases we have cited above.

Petitioners recognize that there is a conflict of opinion among the adjudicated cases from jurisdictions having no statutory provisions similar to the cited Oklahoma statutes as to the validity of provisions similar, in effect, to the one involved in the present case, yet the better-reasoned cases, even in the absence of similar statutes, condemn such provisions as being violative of public policy. See: *Equipment Acceptance*

Corporation v. *Arwood Can Manufacturing Co.* (C. A. 6), 117 F. 2d 442, 446, and cases cited. And, so far as the author of this brief is able to determine, there are no cases from other jurisdictions involving statutes similar to the cited Oklahoma statutes wherein the validity of like provisions have been sustained. See: *San Francisco Securities Corp.* v. *Phoenix Motor Co.*, 25 Ariz. 531, 220 Pac. 229, 231; *Progressive Finance & Realty Co.* v. *Stempel*, 231 Mo. App. 721, 95 S. W. 2d 834, 836; *Dearborn Motors Credit Corp.* v. *Neel*, 184 Kan. 437, 337 P. 2d 992, 1002; *Quality Finance Co.* v. *Hurley* (Mass. 1958), 148 N. E. 2d 385, 388; *Motor Contract Co.* v. *Van Der Volgen*, 162 Wash. 449, 298 Pac. 705, 706; *Pacific Acceptance Corporation* v. *Whalen* 43 Idaho 15, 248 Pac. 444, *supra*; and *American National Bank* v. *A. G. Sommerville, Inc.*, 191 Cal. 364, 216 Pac. 376, 378, *supra*.

Accordingly it must, we respectfully say, be held that the question here presented must be determined by Oklahoma law, and that the provision so relied upon by respondent violates the public policy of said state as expressed in the statutes cited above, and is, therefore, void; and that the same conclusion must be reached, even though this court's decision be based upon the applicable and controlling decisions from other jurisdictions.

It is also a settled rule in Oklahoma that where property is sold for a specific purpose, the law implies

a warranty of fitness, upon breach of which the vendor is liable. See: *Markel* v. *Storkel*, 112 Okla. 287, 240 Pac. 1044; *Rudolph Wurlitzer Co.* v. *Allred*, 120 Okla. 3, 249 Pac. 724; and *Burns Construction* v. *Bilbo* (Okla), 370 P. 2d 913.

The applicable statutes, 15 Okl. Stat. 1961, Sec. 171, *supra*, and 15 Okl. Stat. 1961, Sec. 172, *supra*, on this point, are construed in the case of *Cox* v. *Carnall* (Okla.), 271 P. 2d 343, 344; also see the case of *Jones* v. *Gatewood, et al.*, 381 P. 2d 158.

The above authorities are applicable and controlling here and it necessarily follows that since the involved conditional sales contract expressly shows that the buildings which are described therein were supplied and furnished for grain storage purposes, there was, and is, an implied warranty for their fitness for that purpose, the breach of said implied warranty constitutes a complete defense to the cause of action plead by respondent, since it took said conditional sales contract subject to all defenses available to petitioners against its assignor, and that the quoted provision of said conditional sales contract does not deprive petitioners of their right to maintain their counterclaim for breach of the involved implied warranty.

It does not seem necessary to elaborate further upon the other contentions of respondent, as the Cir-

cuit Court of Appeals did not consider them in reaching its decision, and they would have no bearing upon the determination of this petition; however, the execution of the documents pled by respondent do not estop petitioners from asserting their counterclaim for the reason that execution of said documents was without consideration and respondent has not in any way changed its position.

In view of the matters and authorities hereinbefore set out, it must be concluded that the answers to Questions Nos. 4 and 5 must be in the affirmative, and that the answer to Question No. 6 is that substantial justice cannot be had unless petitioners are allowed their day in court.

CONCLUSION

Courts ordinarily are reluctant to issue special writs or grant summary judgments except in very clear cases in order that litigants may be afforded their day in court, and that litigation might be disposed of upon its merits. It has been held many times that summary judgment was not devised for, and must not be used as a substitute for trial, but should be granted only in those instances where a trial would be useless.

Petitioners respectfully submit that before a summary judgment could have been rightfully entered in this case, that it must have been rightfully concluded as a matter of law that there was no breach of implied warranty of quality and fitness of the grain storage buildings for the purposes intended, as alleged by petitioners and that respondent as assignee of said conditional sales contract, did not take the same subject to petitioners defenses. When considered in this light, it becomes apparent that said judgment is without precedent, and is based upon conjecture and surmise.

We must respectfully submit therefore, that the decision of the Circuit Court of Appeals affirming the judgment of the court below is without precedent and is in direct conflict with the decisions of the Supreme Court of the State of Oklahoma on the same point.

The complaint of respondent herein expressly shows that this action is one of the nature of an action in replevin, based upon a conditional sales contract, and

from the authorities hereinbefore submitted, it must be concluded that respondent took said conditional sales contract subject to all defenses available against respondent, the assignor.

WHEREFORE, your petitioners respectfully pray that in order that substantial justice may be done and that petitioners be not denied their day in court, and their right to present evidence in support of their counterclaim of breach of warranty of quality and fitness of said grain storage warehouses as a defense to respondent's actions, in accordance with the well-established principles of law, and the policy of express law of the State of Oklahoma, that a Writ of Certiorari be granted.

A certified transcript of the record in this case in the Circuit Court of Appeals for the Tenth Circuit is appended hereto in confirmity with Rule No. 21 of this court.

Respectfully submitted,

L. KEITH SMITH,
Jay, Oklahoma,

JOSH J. EVANS,
Vinita, Oklahoma,

Attorneys for Petitioners.

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANUARY TERM—1964

Filed United States Court of Appeals, Tenth Circuit. Mar. 13, 1964. Robert B. Cartwright, Clerk.

No. 7396

RUSSELL J. STRAIGHT, MARY D. EVANS and JOSH J. EVANS, co-partners, doing business as PRYOR HAY & GRAIN COMPANY; and RUSSELL J. STRAIGHT, MARY D. EVANS and JOSH J. EVANS, as individuals; and GENE D. DILLON, Appellants.

vs.

JAMES TALCOTT, INC., Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

George H. Jennings and Josh J. Evans (L. Keith Smith with them on Brief), for Appellants.

Jacob L. Morehead (David R. Milsten with him on Brief), for Appellee.

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal from a summary judgment in a diversity action by the assignee of a conditional sales contract and attached promissory note. The contract and note were made by the appellant-partnership for the purchase and erection of two grain storage buildings. The judgment gave possession of the buildings to the assignee-corporation, and provided for any deficiency after sale. Appellants do not deny the purchase of the buildings or the execution of the contract and note, but assert the seller's breach of implied warranty of fitness as a complete defense to the suit by the assignee. The contract saliently provides: "We [the appellants] will settle all claims against you, the seller, directly with you, you hereby agreeing to remain responsible therefor, and we will not set up any such claim against your assigns. No oral agreement, guaranty, representation, or warranty shall bind you or your assigns." The summary judgment is necessarily based upon the binding effect of the foregoing stipulation, which unmistakably operates to withhold the asserted defense against the assignee, unless as appellants contend, the stipulation is inoperative as contrary to the policy of the law in Oklahoma, as enunciated in suggested Oklahoma statutes.

The stipulation is in some way said to be interdicted by 12 O. S., §222, which provides, "In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due." This statute simply puts the assignee in the shoes of the assignor, in the case of an assignment of a non-negotiable thing in action such as our contract. But, it does not undertake to abrogate or condition the right of the parties to contract with respect to their rights and remedies upon assignment. Particulary, it does not preclude the right of the parties to contract with respect to the waiver of defenses, or to specify the party or parties against whom the defenses may be available as here. See: Anglo-California Trust Co. v. Hall, 211 P. 991, wherein the Utah Court construed a similar statute. And see: Young v. John Deere Plow Co., 115 S. E. 2d 870; and Walter J. Hub Sand & Gravel, Inc. v. Universal C. I. T. Credit Corp., 332 S. W. 2d 619.

Another Oklahoma statute relied upon by the appellants provides: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." 15 O. S., §216. The Oklahoma Court

has finally construed this statute to condemn only those contracts which foreclose a party from enforcing his rights under the contract by a legal proceedings in an ordinary tribunal, and is not directed to stipulations restricting a party to a particular remedy for the enforcement of his rights in an ordinary tribunal. Making application of this construction of the statute, the Court specifically held that "inasmuch as it was competent for the parties to agree how the purchaser should take advantage of any breach of warranty, * * * the course agreed upon by the parties is exclusive * * *." Voris v. Hall, 175 P. 220, reversing Voris v. Gage, 149 P. 150. And see: Metropolitan Life Ins. Co. v. Peeler, 176 P. 939; Moline Plow Co. v. Hooven, 185 P. 103; Long v. Ideal Electric & Mfg. Co., 250 P. 504; Allis-Chalmers Mfg. Co. v. Hawhee, 105 P. 2d 410; Bauman v. International Harvester Co., 130 P. 2d 287; Voltz v. Clark, 303 P. 2d 441; and Staleup v. Easterly, 351 P. 2d 735. Cases relied upon by appellants involve contracts which preclude all resort to the courts, such as arbitration agreements, and are not applicable to the conditional sales contract here. See: Wilson v. Gregg, 255 P. 2d 517; and Boughton v. Farmers Ins. Exchange, 354 P. 2d 1085. Nor, are cases involving fraud, or total failure of consideration pertinent to the contract presently under consideration. See: American Nat. Bank v. A. G. Sommerville, Inc., 216 P. 376; C. I. T. Corporation v. Shogren, 55 P. 2d 956; and Dearborn Motors Credit Corp. v. Neel, 327 P. 2d 992.

Our stipulation is not contrary to the express provisions of any Oklahoma statute, is contrary to express law or otherwise contrary to good morals. See: 15 O. S., §211. It operates to bar the defense of breach of implied warranty as against the assignee, and summary judgment was appropriate.

The decree of the Court with respect to possession and deficiency reads on the terms of the contract. Appellants insist, however, that appellee having elected to recover possession of the chattel, waived his right to recover the purchase price, and that the Court erred, therefore, in providing that any balance remaining after sale "be a judgment against said [appellants], and each of them; and any surplus to be accounted for to them." See: C. I. T. Corp. v. Fisher, 102 P. 2d 848, cited by appellants. The conclusive answer is that the validity of this contractual provision and its enforceability under Oklahoma law, is now settled by Selected Investments Corporation v. Anderson, 319 P. 2d 588, wherein the Oklahoma Court overruled C. I. T. v. Fisher, ibid, holding "* * * that the repossession of the chattel for this purpose [i. e., sale] where authorized in the agreement, is not an election or rescission of the agreement barring any action for any deficiency remaining after application to the debt of the proceeds of the sale." And see: Welles v. Acree Motor Co., 107 P. 2d 175.

The judgment is AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

January Term—1964

No. 7396

RUSSELL J. STRAIGHT, MARY D. EVANS and JOSH J. EVANS, co-partners, doing business as PRYOR HAY & GRAIN COMPANY; and RUSSELL J. STRAIGHT, MARY D. EVANS and JOSH J. EVANS, as individuals; and GENE D. DILLON,

Appellants,

vs.

JAMES TALCOTT, INC., Appellee.

JUDGMENT

Forty-Fifth Day, January Term, Friday, March 13th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 5378-Civil

JAMES TALCOTT, INC., Plaintiff,

vs.

RUSSELL J. STRAIGHT, MARY D. EVANS, JOSH J. EVANS, Individually and as partners in PRYOR HAY & GRAIN COMPANY, a partnership, and GENE D. DILLON, an Individual, Defendants.

ORDER AND JUDGMENT

This cause having come on to be heard on Motion of plaintiff, for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the

Court having considered the pleadings in the action and the various briefs filed by plaintiff in support of Motion, and briefs filed by the defendants in opposition thereto, and having heard oral argument, and having found that there is no genuine issue of fact to be submitted to the trial Court, and having concluded that plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED that plaintiff's Motion for Summary Judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED that there is due on the conditional sales contract and promissory note, of which plaintiff is the owner, the sum of $31,050, consisting of $27,000 principal, and $4,050 attorney fees, as provided therein, with interest thereon at the rate of 10 per cent per annum from the 15th day of September, 1961, and by reason of such default, plaintiff does have and recover judgment for the possession of the goods, wares and merchandise set forth in said conditional sales contract, to-wit:

> 2 - 70' x 180' x 20' Inland Steel Grain Storage Buildings, Serial Numbers 1043 and 1129, together with component parts, accessories, concrete foundation and floor,

all as provided in said conditional sales contract, for the purpose of sale, with net proceeds thereof to be credited upon the amount unpaid, with any balance to be a judgment against said defendants, and each of them; and any surplus to be accounted for to them.

That the plaintiff recover from defendants its costs and disbursements in this suit, to be taxed by the Clerk.

Defendants except to the order and judgment of the Court, which exceptions are allowed by the Court.

DATED this 3 day of May, 1963.

/s/ LUTHER BOHANON,
UNITED STATES DISTRICT JUDGE.

Appendix D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
January Term—1964

No. 7396

RUSSELL J. STRAIGHT, MARY D. EVANS and JOSH J. EVANS, co-partners, doing business as PRYOR HAY & GRAIN COMPANY; and RUSSELL J. STRAIGHT, MARY D. EVANS and JOSH J. EVANS, as individuals; and GENE D. DILLON, Appellants,

vs.

JAMES TALCOTT, INC., Appellee.

ORDER DENYING APPELLANTS' PETITION FOR REHEARING

Thirteenth Day, March Term, Monday, April 13th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the Court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1962

No. [redacted] 137

RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, co-partners, doing business as Pryor Hay and Grain Company; and RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, as individuals; and GENE D. DILLON, *Petitioners*,

vs.

JAMES TALCOTT, INC., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID R. MILSTEN,
1005 Thompson Bldg.
Tulsa, Oklahoma,

Attorney for Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1963

No. 1169

RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, co partners, doing business as Pryor Hay and Grain Company; and RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, as individuals; and GENE D. DILLON, *Petitioners*,

vs.

JAMES TALCOTT, INC., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and associate justices of the Supreme Court of the United States:

James Talcott, Inc., respondent, respectfully submits this brief in opposition to the petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by petitioners Russell J. Straight, Mary D. Evans, Josh J. Evans, co partners, doing busi

ness as Pryor Hay & Grain Company, and Russell J. Straight, Mary D. Evans, and Josh J. Evans, as individuals; and Gene D. Dillon.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, is reported in 329 F. 2d 1. The opinion as set forth in Appendix A of petitioners' petition for Writ of Certiorari is in error in including the words "is contrary to express law" in the first sentence of the paragraph appearing at the top of Page 33 of the petition. These words are not in the reported opinion nor in the copy of the opinion furnished respondent by the clerk of the Court of Appeals.

STATEMENT OF CASE

Respondent filed an action for replevin of personal property under a conditional sales contract in the United States District Court for the Northern District of Oklahoma. Respondent is successor to the assignee of the vendor under the conditional sales agreement. Jurisdiction of the Federal Court was invoked on the grounds of diversity of citizenship and a controversy involving an amount in excess of $10,000.00, exclusive of interest and cost. No Federal question in any manner exists, and the rights of the parties are governed by the laws of the State of Oklahoma.

Petitioners' sole defense was an attempt to set up breach of an implied warranty of fitness of the property

sold, two Inland steel grain storage buildings, with parts, accessories, etc., for the use intended. The conditional sales contract contained these clauses:

> "We will settle all claims against you, the seller, directly with you, you hereby agreeing to remain responsible therefor, and we will not set up any such claim against your assigns.
>
> "No oral agreement, guaranty, representation, or warranty shall bind you or your assigns." (Transcript, Page 5)

After amendment of the original petition and answer in the trial court, respondent moved for summary judgment under Federal Rules of Civil Procedure, Rule 56, on the grounds that there was no genuine issue of material fact upon which the outcome of the litigation depended. Respondent supported its position on the basis that:

> (1) By the terms of the contract, claims for breach of warranty could not be set up against an assignee.
>
> (2) The provisions and terms of the contract negated the existence of any implied warranty.
>
> (3) The petitioners were estopped by reason of an extension and forbearance agreement. (Transcript, Pages 14 and 15)

The motion for summary judgment was thoroughly briefed and argued and, after due deliberation, the Honorable Luther Bohanon, the trial judge, sustained the motion for summary judgment. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. After submission of briefs and oral argument be-

fore the Chief Justice and two of the associate justices, the Court of Appeals affirmed the judgment of the District Court in an opinion written by Chief Justice Marrah. Petitioners filed a request for rehearing, which was denied.

GROUNDS FOR DENIAL OF WRIT

I.

Petitioners presented the same basic argument and citations before the District Court and the United States Court of Appeals for the Tenth Circuit. The only case or statute cited by petitioners in their petition for Writ of Certiorari not heretofore contained in their brief to the Court of Appeals is 15 Okl. St. 1961, Section 171, set forth on Page 6 of said petition for Writ of Certiorari. This section of the statute, by its specific terms, is inapplicable to expressed contract provisions.

An appeal to the Supreme Court for Writ of Certiorari is not a matter of right to any party litigant but is granted only on a showing of special and important reasons therefor, and in the exercise of sound judicial discretion. Supreme Court Rules, Rule 19 (1). Petitioners seek to appeal to this *sound judicial discretion* on the grounds that the United States Court of Appeals for the Tenth Circuit has decided an important question of Oklahoma law contrary to the decisions of the Supreme Court of the State of Oklahoma and to the statutes of Oklahoma and on the further grounds that

the decisions of both the United States District Court for the Northern District of Oklahoma, with the sanction of the United States Court of Appeals for the Tenth Circuit, and the decision of the United States Court of Appeals for the Tenth Circuit, itself, have so far departed from accepted and usual course of judicial proceedings as to call for the Supreme Court to exercise power of supervision to correct such non-judicial actions at the lower courts.

Petitioners are seeking to invoke the consideration of this court to obtain one more appeal to which they are not entitled. No new question nor any unusual or special situation is presented. The argument to this court for the Writ of Certiorari is the identical argument made to the learned judge of the trial court as well as to the Chief Justice and associate justices in the United States Court of Appeals for the Tenth Circuit. The Writ of Certiorari sought by these petitioners is not a matter of right but will be granted only where there are special and important reasons therefor. Review by certiorari does not provide a normal appellant channel. The opinion of the Court of Appeals is not based on a conclusion patently contrary to or overruling the decisions of the state court. On the contrary, the opinion of the Court of Appeals finds the law to be as the "Oklahoma court has finally construed" it and affirms principles that "under Oklahoma law are now settled." Petitioners' complaint is that the opinion of the United States Court of Appeals for the Tenth Circuit on the Oklahoma law is contrary to that of the

petitioners. This is, in effect, merely an attempt of petitioners to obtain an additional review and presents no "special or important reasons" for the issuance of a Writ of Certiorari. *Fay v. Noia*, 372 U. S. 391, 83 S. Ct. 822, 847; *Wolf v. Weinstein*, 372 U. S. 633, 83 S. Ct. 969, 972; *The Monrosa v. Carbon Black Exports, Inc.*, 359 U. S. 180, 79 S. Ct. 710, 3 L. Ed. 2d 722.

II.

The Honorable Luther Bohanon, trial judge, is a lawyer of long experience in practice in the State of Oklahoma prior to his appointment to the Federal Judiciary in Oklahoma. Upon consideration of the arguments of petitioners, later presented to the United States Court of Appeals for the Tenth Circuit, as well as to this court on the petition for Writ of Certiorari, Judge Bohanon overruled their argument and gave summary judgment to the respondent. Briefs and arguments were presented to the United States Court of Appeals for the Tenth Circuit, before The Honorable Alfred P. Murrah, Chief Judge, as well as The Honorable Jean S. Breitenstein and The Honorable Delmas C. Hill, Circuit Judges. Judge Murrah was a practicing lawyer in the State of Oklahoma with years of experience before his appointment to the United States District Court in said state and his subsequent service to the United States Court of Appeals for the Tenth Circuit. The opinion of Judge Murrah shows a careful analysis of the facts, [illegible] and stat-

utes. Both the Federal District Court sitting in Oklahoma and the United States Court of Appeals for the Tenth Circuit have interpreted the pertinent Oklahoma decisions and statutes. Considering the long experience of these judges in the local law of this state and their familiarity with the intricacies and trends of local law and practice, the decision of these judges should be accepted and the Writ of Certiorari denied. *Richards v. United States*, 369 U. S. 1, 82 S. Ct. 585, 594, 7 L. Ed. 2d 492; *General Box Company v. United States*, 351 U. S. 159, 165, 76 S. Ct. 728, 732, 100 L. Ed. 1055; *Huddleston v. Dwyer*, 322 U. S. 232, 237, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246; *Rianga v. Merchants Transfer and Warehouse Co.*, 337 U. S. 530, 534, 69 S. Ct. 1233, 1235, 93 L. Ed. 1520; *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273, 277, 100 L. Ed. 199; *Appalachian Power Company, et al., v. American Institute of Certified Public Accountants, et al.*, 261 U. S. 887, 89 S. Ct. 16, 18, 4 L. Ed. 24 121; *Hillsborough Tp., et al., v. Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 451; *Steelo v. General Mills, Inc.*, 329 U. S. 433, 439, 67 S. Ct. 439, 442, 91 L. Ed. 402.

III.

The decision of Chief Justice Murrah for the Circuit Court, Tenth Circuit, is in complete accord with the decisions of the Supreme Court of the State of Oklahoma. Petitioners do not cite any case from Oklahoma holding that a contractual stipulation providing for the method to

warranty is void under the terms of any Oklahoma statute. Indeed, there are none. The Oklahoma court has specifically and for years consistently held as set forth in Judge Murrah's opinion that, "inasmuch as it was competent for the parties to agree how the purchaser should take advantage of any breach of warranty, • • • the course agreed upon by the parties is exclusive • • •." *Voris v. Hall*, 175 P. 220, reversing *Voris v. Gage*, 149 P. 150. And see: *Metropolitan Life Ins. Co. v. Peeler*, 176 P. 939; *Mowine Plow Co. v. Hoover*, 185 P. 103; *Long v. Ideal Electric & Mfg. Co.*, 250 P. 504; *Allis-Chalmers Mfg. Co. v. Hughes*, 105 P. 2d 410; *Bauman v. International Harvester Co.*, 130 P. 2d 287; *Voltz v. Clark*, 303 P. 2d 441; and see also *Norton Buick v. E. W. Tune Co.*, 351 P. 2d 731, at Page 735 (Okla. 1960). Petitioners refused to acknowledge that the contractual provision here involved does not preclude all resorts to the court as did provisions contained in stipulations for arbitration in *Wilson v. Gregg*, 208 Okl. 291, 255 P. 2d 517; and *Boughton v. Farmers Insurance Exchange*, (Okla.) 354 P. 2d 1085; or cases involving contractual limitations on time in which to bring an action which is directly contrary to the expressed terms of 15 Okl. St. 1961, Section 216, as in *Merchants & Manufacturers Ins. Co. of New York v. Burns*, 205 Okl. 31, 234 P. 2d 409; and *Fidelity Cas. Company v. Board of Commissioners* (Okla.), 342 P. 2d 547.

The distinguishing factual impediment involved in these arbitration and time limitation cases, as well as the cases from other jurisdiction involving fraud and total failure of consideration was clearly stated in Judge Murrah's opinion. The contractual stipulation involved in this case affirmatively provides for the pursuit of any claim by the petitioners herein against the original seller. The contract plainly states that such claims will be settled directly with the seller, and the seller agrees to remain responsible therefor. The petitioners have in fact, after the decision of the District Court granting respondent a summary judgment and while appealing such decisions to the United States Court of Appeals for the Tenth Circuit, pursued their claim for breach of implied warranty against the vendor in a suit now pending in the state court at Tulsa County, Oklahoma. In the words of *Voris* v. *Hall*, *supra*:

> "There is no stipulation or condition contained in . . . contracts by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, and the facts that the parties are now engaged in an effort to enforce what they deem to be their respective rights under the contract by legal proceedings in the ordinary tribunal of the state furnishes the most convincing proof that this is so."

The decree of the trial court in regard to the possession of the property sought to be replevied for the purpose of the sale and the deficiency is in accordance

with the terms of the contract. If there was ever any doubt as to the validity of such contractual provisions under the Oklahoma law, the question has been laid to rest in *Selected Investments Corporation* v. *Anderson*, (Okla. 1957) 319 P. 2d 588. This case expressly overrules prior Oklahoma cases indicating to the contrary and states at Page 590 of the Pacific Reporter:

> "Thus we are firmly committed to the general rule that provisions of the nature here called in question are valid, where incorporated into a conditional sales contract and that the repossession of the chattel for this purpose, where authorized in the agreement is not an election or rescission of the agreement barring an action for any deficiency remaining after application to the debt of the proceeds for the sale."

Haubert v. *Bryan & Doyle*, 171 Okl. 338, 43 P. 2d 68, cited by the petitioners does not confirm petitioners' contentions. On Page 70 of the Pacific citation, the court held:

> "Where the seller rescinds the conditional sale and retakes the property, he may recover a money judgment from the buyer where their contract so provides, if this provision is supported by a valuable consideration."

The United States Court of Appeals for the Tenth Circuit correctly interpreted the Oklahoma law in respect to the validity of the contractual provisions for enforcing an implied warranty and in approving the decree of the District Court with respect to the posses-

sion of the property sought to be replevied and the deficiency, if any, thereafter.

IV.

Respondents filed their original petition for replevin in the United States District Court for the Northern District of Oklahoma on April 3, 1962. (Tr., p. 3) The contract upon which the action is predicated was executed on June 28, 1958. (Tr., p. 3) On July 21, 1961, the Oklahoma Uniform Commercial Code, known as Senate Bill No. 36, was approved by the Governor of the State of Oklahoma. This act became effective at midnight on December 31, 1962. (12-A Okl. St. 1961, Section 10-101). Section 9-206 (1) of the Oklahoma Uniform Commercial Code reads as follows:

> "(1) Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement." 12-A Okl. St. 1961, Section 9-201 (1).

This provision of the present Oklahoma law specifically authorizes by statute the contractual stipulations and agreements in question in this proceeding. There is no

separate rule in Oklahoma applicable to consumer goods and, in any event, the sale involved here is not of consumer goods but of steel warehouse buildings. Since the original petition in the instant case was filed prior to the effective date of the Oklahoma Uniform Commercial Code, the provisions of the Commercial Code could not be directly applicable to the determination of this cause. The enactment of such statute does, however, negate any claim that the agreement not to raise a breach of warranty against an assignee is against the public policy of the state. *Walter J. Hub, Sand & Gravel, Inc., v. Universal C. I. T. Credit Corp.*, (Ky.) 332 S. W. 2d 619.

Additionally, the fact of such new Oklahoma legislation covering the question involved in this cause makes the determination moot on any subsequent controversy. Petitioners' plea for Writ of Certiorari is stripped of any possible importance to the public. Certiorari should not be granted except in cases involving principles, a settlement of which is of importance to the public as distinguished from that of parties. The Supreme Court does not sit to satisfy mere scholarly or intellectual interest nor for the benefit of particular litigants. "The special and important reasons" within the rule relating to granting a Writ of Certiorari require that the problem not be one of isolated significance, even if it presented questions which the court would otherwise have sought to review. *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 75 S. Ct. 614.

CONCLUSION

I. The Writ of Certiorari sought by petitioners herein should be denied for the reason that petitioners are seeking merely an additional appeal in the normal sense of this procedure to review again the decision of the trial judge. The decision of the Court of Appeals follows the Oklahoma law as determined by both the District Court and the United States Court of Appeals for the Tenth Circuit.

II. The trial judge and the Chief Justice of the Court of Appeals, who wrote the opinion for that court, are long experienced in the laws of the State of Oklahoma and are familiar with the intricacies and trends of the local law and practice. The decisions of these judges as to the local law should be accepted by the Supreme Court and the Writ of Certiorari denied.

III. The decision of the United States Court of Appeals for the Tenth Circuit is fully in accord with the decisions of the State of Oklahoma and any modification would do violence to the settled long-standing decisions ~~of that~~ state.

IV. The enactment of the Oklahoma Uniform Commercial Code, subsequent to the commencement of the litigation involved herein, has made the questions involved in this litigation moot except for the individual interest of these litigants. There being no principles, the settlement of which is of importance to the public as

distinguished from that of the parties, the Writ of Certiorari should be denied.

WHEREFORE, respondent respectfully prays that the Writ of Certiorari requested by petitioners herein be denied.

Respectfully submitted,

DAVID R. MILSTEN,

Tulsa, Oklahoma,

Attorney for Respondent.

Supreme Court of the United States

PETITION FOR REHEARING OF ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

OCTOBER TERM, 1964

No. 137

RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, co-partners, doing business as Pryor Hay and Grain Company; and RUSSELL J. STRAIGHT, MARY D. EVANS, and JOSH J. EVANS, as individuals; and GENE D. DILLON, *Petitioners,*

v.

JAMES TALCOTT, INC., *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that this court grant rehearing of its order of October 12, 1964 denying the petition for Writ of Certiorari, — U.S. —, 85 S.Ct. 44, 13 L.ed. 2d 33, and that a Writ of Certiorari issued to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed on June 1, 1964, herein.

REASONS FOR GRANTING THE HEARING AND ISSUING THE WRIT

1. This is a case in which state laws and decisions are applicable, the Federal jurisdiction below being by virtue of diversity of citizenship.

It is a well established principle of law of the State of Oklahoma "that the defenses of purchasers under a conditional sales contract are available to them not only against the seller but subsequent purchasers and assignees as well."

This was recently reaffirmed as to previous decisions pertaining to said principle of law by the Supreme Court of Oklahoma in the case of *James Talcott, Inc.* v. *Finley,* 389 P. 2d 988, March 3, 1964. The court further held that when the assignee of a conditional sales contract sought possession by replevin of the chattels involved it waived the question as to the negotiability of the instrument, if it was negotiable, and thereby made available to the purchaser, the maker, any defenses he had against the original payee, the assignor.

The petitioners, herein, therefore, find themselves in the dilemma of being confronted with a decision of the lower court and affirmed by the Court of Appeals in irreconcilable conflict with said well established principle of law of the State of Oklahoma and which will become a final judgment unless the writ is granted.

The lower court and the Court of Appeals, as well, have refused to follow this well established principle of law of the State of Oklahoma and unless this conflict is resolved, an unjustifiable discrimination between persons in different jurisdictions will result. This is best illustrated by the decision of the Supreme Court

of Oklahoma in the case of *James Talcott, Inc.* v. *Finley, supra,* and the case at bar. The decision of the lower court herein involving the same corporation, James Talcott, Inc., is diametrically opposed to the decision in said case of *James Talcott, Inc., supra,* although the facts and issues in these two cases are substantially indistinguishable. In other words, the petitioners herein are denied the right of asserting their defense of breach of warranty of quality and fitness of the items purchased from the respondent, James Talcott, Inc., to its action, whereas if there had been no diversity of citizenship they would have been permitted to assert the same in the State courts of Oklahoma.

2. Prior to June 25, 1948 with the enactment of 62 Stat. 1359 modifying 25 Stat. 434 which provided that no District Court should "have cognizance of any suit (except foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might be prosecuted in such court to recover upon said note or other chose in action if no assignment had been made" that the action herein could not have been brought in a Federal District Court. See *Kolze* v. *Hoadley,* 200 U.S. 76. Now, however, since the present section of said Act permits a bona fide assignee or transferee to bring his action in Federal Court on grounds of diversity of citizenship (provided other requisites as to jurisdiction are met such as amount in controversy under 62 Stat. 1332), the Federal Courts have the responsibility of following and upholding the applicable state laws and decisions pertaining thereto. Therefore, we must re-

spectfully submit that the writ should issue, and said conflict resolved by directing the Court of Appeals to require the lower court to make its decision conform to the said well established principle law of the State of Oklahoma hereinabove set out.

3. The lower court treated the replevin action of James Talcott, Inc. herein as a simple suit on a note and for the foreclosure of an equitable lien and without the introduction of any evidence entered personal judgment against petitioners including an award of unreasonable and excessive attorneys' fees. Reference to Appendix hereto, which is an excerpt from the transcript of the District Court Judge's remarks shows the cavalier manner in which he handled the matter.

He holds that petitioners had to prove fraud when it is not necessary to allege or prove fraud in a breach of warranty action. The Court talks about a valid contract, about the fact that the buildings met the plans and specifications when there was no evidence in record of this—nor could this be inferred from the pleadings. In a motion for summary judgment the petitioners' answer has to be considered as true. The petitioners' answer raises several questions of fact. A breach of contract is always a question of fact and was pleaded by petitioners in paragraph 9 of the amended answer. The Court's decision is based entirely on matters, even if they were accurate, entirely outside the pleadings. No authorities are cited or discussed by the Court in support of the granting of the motion.

This judgment is one which could not have been rendered under the pleadings and is, therefore, such a departure from the accepted and usual course of judi-

cial proceedings and the Court of Appeals has sanctioned such departure by the lower court, as to call for an exercise of this court's power of supervision.

4. The Supreme Court of the State of Oklahoma has recently handed down a decision in the case of *Hollamon* v. *First State Bank of Stroud*, 389 P. 2d 352, wherein the court held:

> "Where the principal of a loan and interest thereon are payable in installments at specified intervals within the full loan period, and interest is computed in such a manner that allowance has not been made for the reduction of the principal by reason of the installment payments, if such interest exceeds the maximum contract rate of interest computed on the balance of the principal after each of the installments are paid, such plan is usurious."

Under this holding James Talcott, Inc. has charged petitioners a rate of interest in excess of the legal rate of interest permitted by the provisions of Title 15 Oklahoma Statutes 1961, Section 266, which provides that the maximum contract rate shall not exceed 10 per cent per annum. Therefore, this recent holding gives petitioners, in addition to the other defenses they are entitled to assert against the respondent an additional counterclaim against respondent which petitioners should have an opportunity to assert against James Talcott, Inc. in a trial of this case on its merits.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a

writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

L. KEITH SMITH
Jay, Oklahoma

JOSH J. EVANS
107 E. Illinois
Vinita, Oklahoma
Counsel for Petitioners

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JOSH J. EVANS
One of the Counsel for Petitioners

APPENDIX

Excerpt From Transcript of Proceedings at Hearing in the United District Court for the Northern District of Oklahoma on Motion of Respondent for Summary Judgment on April 5, 1963.

"THE COURT: I have read these briefs over very carefully, and I have read the pleadings.

"I am convinced that this plaintiff is entitled to a judgment against these defendants and that's all there is. Is it a valid contract or is it not a valid contract?

"And to me, the defendant comes in here so many years after this building has been put up, has used it all these years, made no complaint, paid it down to almost nothing, and there it is, and the minute they file this lawsuit against the defendant to collect on their paper, they say everything is wrong with it.

"MR. JENNINGS: Your Honor, please, may I make this observation?

"THE COURT: Yes.

"MR. JENNINGS: If your Honor will pardon me. The pleadings do not show whether complaint was made or not, but the defendants did complain—I mean if the case were tried on its merits.

"THE COURT: Don't you have to prove, to get by with what you are talking about, Mr. Jennings, that you've got proof so strong to say that you have been defrauded? There is no allegation of fraud here at all. I may be wrong on that. I am not saying it's right at all.

"MR. EVANS: If the Court please, might I say a word in this?

"THE COURT: Sure.

"MR. EVANS: If the Court please, I don't want to get into the evidence or what it will show, but the Federal

Government has condemned these buildings for the purpose for which they were sold to us.

"THE COURT: I don't think these builders ever told you they were going to keep moisture out of that wheat. There was nothing ever said. They built these buildings according to the plans and specifications and you were in possession, you have used it. Of course now they may have condemned it. I don't know. But I don't think that's material. This building was built and erected and accepted, and year after year you made payments, you made payments, then you quit paying.

"Then they bring this lawsuit and then you find everything wrong with it.

"Plaintiff will prepare—

"MR. EVANS: (Interposing) Your Honor, could I just say one—

"THE COURT: (Interposing) Oh, yes, sure.

"MR. EVANS: Your Honor, I would like to point out to you that in our amended answer, the defendant in this case as soon as discovered this notified the plaintiff. In other words, there was considerable negotiation on this matter, and I just feel that we'd like your Honor to consider this further, particularly since Mr. Smith isn't here, and we feel that there is a question of fact here.

"Certainly this Oklahoma case, your Honor, I'd like to call that further to your Honor's attention, that the Supreme Court of Oklahoma in that case said—and it was a case just like this, where there were plans and specifications, and it isn't just a question that it's built. That's the very point. It isn't just a question of whether it was built according to the plans and specifications, your Honor, but the Supreme Court of Oklahoma says and quotes that, the last paragraph of page 20 there, under this Cox versus Granada case, that 'Where a contract does not provide

for the contrary, the builder must decide whether material, plans and specifications will produce building intended by parties at his peril, and is liable to owner if intended building is not produced;' and your Honor, as Mr. Jennings has said in this case, the question is: Have these buildings failed?

"We say they have. The facts will show they have failed. Your Honor, the facts will show that the Federal Government has condemned them, which has happened.

"They have not cited one case. He doesn't give your Honor a case, and all the argument in the world, your Honor, will not change the law or the facts in this case, and to our intention—he admits right off in his first statement that we have a defense. He admits that but then he tries by argument, which as Mr. Jennings pointed out, is a minority view in cases in states where they have no statute, and the majority view is that states where they have no statute, that such a provision as he is arguing to your Honor it is not considered and is not the best reasoned opinion.

"Certainly in states where they have a statute as Oklahoma has, through the American Digest system, your Honor, we have made an exhaustive search and he cannot provide your Honor with one case.

"It's so clear to us, your Honor, that we didn't even really think he was serious about it. In fact, I don't think he is.

"THE COURT: I think so. I think he is serious about it. I think there comes a time when you are supposed to pay, you know, supposed to pay your mortgages. You bought this building and you brought this lawsuit; and the Court is granting judgment to the plaintiff on their motion, and from there you can take it, but I am satisfied that the plaintiff is right and entitled to judgment in this case.

"MR. JENNINGS: Will your Honor please note our exception.

"THE COURT: Oh, sure, note your exception. The record is here. Of course either party can take an appeal from it, but it just strikes me that the time has come to pay, pay for this material that they have had for many years.

"MR. EVANS: The only thing, your Honor, is that we just didn't get what we paid for.

"THE COURT: Well, you waited an awful long time to say anything about it, not until after they filed this lawsuit."